

FC7JJEN1

Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 NORMAN JENKINS,

4 Plaintiff,

5 v.

13 Civ. 03405 KPF

6 NEW YORK CITY POLICE
7 DEPARTMENT, et al.,

8 Defendants.

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9
10 December 7, 2015
11 9:10 a.m.

12 Before:

13 HON. KATHERINE POLK FAILLA,

14 District Judge
15 and a jury

16 APPEARANCES

17 ROBERT J. BOYLE,
18 GIDEON ORION OLIVER,
19 ABRAHAM J. HASSEN,
Attorneys for plaintiff

20 MICHAEL A. CARDOZO,
21 Corporation Counsel for the
22 City of New York
23 100 Church Street
New York, New York 10007

24 DANIEL LOUIS PASSESER,
25 TAVISH CORYELL DeATLEY,
Assistant Corporation Counsel

FC7JJEN1

Trial

1 (In open court; jury not present)

2 (case called)

3 MR. BOYLE: For the first time here I want to
4 introduce Abraham Hassen, who is admitted to New York State
5 Bar, not yet admitted to the Southern District. With the
6 court's permission, may he sit at counsel table and assist us
7 during the trial?

8 THE COURT: Mr. Hassen, thank you and good morning to
9 you. Mr. Jenkins, good morning to you.

10 MR. JENKINS: Good morning.

11 THE COURT: Good morning to each of you.

12 I have a couple of loose ends that I thought I'd do
13 while the jury was seeing their video on jury service. So I
14 received some materials from the parties towards the end of
15 last week, and let me try and address them in the order in
16 which I received them.

17 There is a question about the cross-examination of
18 Ms. Hamilton, and so I think, Mr. Boyle, I understand the
19 position of your letter -- yes, it is submitted by you. I was
20 wondering if I could hear from Mr. DeAtley because it was your
21 letter in response, sir. I guess what I would like to
22 understand, sir, how much you plan or think you're delving into
23 the elements of the offense.

24 MR. DeATLEY: We simply want to ask Ms. Hamilton
25 whether or not intend to defraud, deceive or injure is an

FC7JJEN1

Trial

1 element of criminal possession of a forged instrument. That is
2 it.

3 THE COURT: If and when she says, "I don't know"?

4 MR. DeATLEY: Then we'll move on.

5 THE COURT: Okay. All right. I will allow that one
6 question.

7 MR. DeATLEY: Thank your Honor.

8 THE COURT: On the issue of the IAB substantiated, not
9 so substantiated, unclear discussions, I did receive from the
10 city information indicating with greater granularity how that
11 particular IAB investigation shook out and as to whom certain
12 claims were found substantiated and certain claims were found
13 unsubstantiated. I then received from plaintiff's counsel,
14 Mr. Oliver, in particular, a letter, dated December 4th, which
15 was submitted to me under seal. I don't even know, was it
16 submitted to the other side?

17 MR. OLIVER: Yes, your Honor.

18 THE COURT: It was under seal because of the nature of
19 the statements made therein?

20 MR. OLIVER: Yes, your Honor.

21 THE COURT: I could hear from the parties on this if
22 you like me to. I think I understand the positions.

23 Mr. Oliver, if there is anything I am missing you want
24 to tell me now, I will happily hear from you, sir.

25 MR. OLIVER: I doubt there is.

FC7JJEN1

Trial

1 THE COURT: Mr. DeAtley or Mr. Passeser, if you want
2 to add anything to what you said to me previous, that is fine.

3 MR. DeATLEY: We reiterated on claims substantiated as
4 to Officer Charles, based on your Honor's previous order, we
5 follow the same guidelines your Honor issued.

6 THE COURT: Having thought about this, I am sticking
7 with my prior decision because while I was interested in the
8 materials contained herein. I think they're still a little
9 attenuated for me to have some finding made as to Officer
10 Charles. There is no direct allegation of his misconduct.
11 There is no jury finding of his misconduct. I don't think I am
12 in any different position than I was with respect to the
13 information I heard from the city. So I will deal with it in
14 that way.

15 Let me hear a little bit from Mr. Boyle, this was in
16 the second part of your letter to me -- no. Let me look at it.
17 Maybe it is Mr. Orion. Mr. Gideon Orion Oliver, I enjoy the
18 name. Are you going to speak to me on the issue of force
19 performance monitoring? You cited Judge Trager's decision to
20 me.

21 MR. OLIVER: That was directly before the defense
22 counsel provided further information about force monitoring
23 which I hadn't had before.

24 THE COURT: Exactly. What I would like to know is now
25 that you and I have that additional information, what is the

FC7JJEN1

Trial

1 plaintiff's view regarding those questions?

2 MR. OLIVER: Well, your Honor, I think our position is
3 that we would like to be able to cross-examination the
4 defendants about being put on Level I force monitoring.

5 THE COURT: No. Which of them precisely were placed
6 on it?

7 MR. OLIVER: I think all three of them were placed on.

8 THE COURT: I didn't think all three had three
9 complaints in the one-year period. Mr. DeAtley or Mr.
10 Passeser, perhaps you agree or disagree?

11 MR. DeATLEY: Sergeant Ruiz was on Level I force
12 monitoring from October 13, 2009 to October 21, 2010. Officer
13 Charles was on force monitoring February 4, 2011 to February 4,
14 2012.

15 THE COURT: Mr. Oliver, with that in mind, let's talk
16 a little bit more about your thoughts.

17 MR. OLIVER: We would like to be able to ask
18 defendants Ruiz and Charles limited questions about force
19 monitoring, the force monitoring; when were they placed on, why
20 were they placed on force monitoring, and I think that would
21 really be as far as we would want to go.

22 THE COURT: Do you read from the policy that it's a
23 sheer question, simple question of number? Whether the
24 complaints are substantiated or unsubstantiated?

25 MR. OLIVER: I think that is true, your Honor. I

FC7JJEN1

Trial

1 think that is true, yes, that is how I read the policy. It
2 doesn't have to do a substantiation or lack of substantiation.
3 I also note defendant Ruiz was on force monitoring at the time
4 of the incident, to the extent that might matter to the court?

5 THE COURT: Keep going.

6 MR. OLIVER: Well, to the extent that part of our
7 argument is that the information is relevant in terms of motive
8 and intent, the fact that the defendant Ruiz was on force
9 monitoring at the time of the incident would go into,
10 potentially go into motive and intent. I think that is our
11 position.

12 THE COURT: Thank you.

13 Mr. DeAtley or Mr. Passeser, what did it mean for
14 Officer Ruiz to be on force monitoring at the time of the
15 incident if, indeed, he was on force monitoring at the time of
16 the incident?

17 MR. PASSESER: He wasn't on force monitoring.

18 Level I force monitoring is that there is a
19 communication between the commanding officer and the officer
20 being placed on monitoring. They develop a plan. It is not
21 always the same plan.

22 THE COURT: Let's let our visitors have a seat.

23 (Pause)

24 MR. PASSESER: I don't know the details of this
25 particular plan. It is different in every case. What it means

FC7JJEN1

Trial

1 is the commanding officer takes an interest in the officer and
2 watches them and evaluates them according to a plan they
3 develop together.

4 THE COURT: I am going to think about this one a
5 little bit more. I do have a little bit of time this morning
6 to do that. Let me raise a few more housekeeping measures with
7 the parties. I feel better prepared for trial when I actually
8 prepare for trial, and so this weekend I read the depositions
9 of the witnesses and I read through all the parties' exhibits.

10 With respect to the exhibits issue, I wanted to note
11 just a few things. I am sure the parties see this already, but
12 there is, for example, the duplication with respect to the
13 medical records. I did not know if perhaps whoever introduces
14 their record in first, the other side might not just use that
15 particular designation. Maybe one is a subset of the other,
16 but I thought they were largely co-extensive. Think about
17 that. I won't make you --

18 MR. BOYLE: We spoke about it.

19 THE COURT: You have had discussions without me
20 present? That is fantastic. What was the result of that?

21 MR. BOYLE: We agreed -- and please correct me -- only
22 one set needs to go in. In fact, in the confusing way it was
23 produced to plaintiff, the defendants' exhibits are better
24 organized in that way and we may do it on our case, but we may
25 say marked as -- I don't know how the court would do it in that

FC7JJEN1

Trial

1 way. We would have only one set would come in. It would be
2 the way the city put them together.

3 THE COURT: I tell the jury at the end it doesn't
4 matter who marked the exhibit, it doesn't matter who called the
5 witness. I can say that same thing. If it turns out you're
6 introducing a defense exhibit and it looks a little
7 incongruous, that is not a big deal.

8 Another question. Do the parties agree on the issue
9 of authenticity or authentication of each of the exhibits? Not
10 admissibility. The more fundamental issue is if something is
11 supposed to be a medical record from a particular place, if
12 something is someone's notebook? Are the parties agreeing
13 about authentication? I ask this because that might
14 short-circuit some of the questions. You don't have to ask
15 questions about who wrote it.

16 So I just wondered if the parties had talked about
17 that? If you haven't, then perhaps you can while we are
18 waiting for the jury to come down. There is a larger question
19 about admissibility. It would not surprise me to learn the
20 parties have a dispute about admissibility of certain
21 documents. That is why I am not asking that question.

22 I will note this, though. You will deal with it as
23 you see fit. This is one girl's view, if you will. Some of
24 the exhibits that were presented to me contained information in
25 them that I understood to be the subject of in limine motions.

FC7JJEN1

Trial

1 If you want that, if that information is in that
2 exhibit because that exhibit is there and marked to show a
3 witness, to refresh a witness's recollection or for some other
4 reason, perhaps to impeach a witness, that is great. All I am
5 saying is, we had some pretty thoughtful discussions about why
6 certain things shouldn't be mentioned.

7 I am seeing references to them in the documents. So
8 if that is what you want, that is fine. If that is what you
9 don't want, please get out a black pen sometime between now and
10 the introduction of the exhibit.

11 I will ask the parties, perhaps one of you is going to
12 be handling jury charge issues. You should understand that we
13 are trying to get together questions for the qualified immunity
14 portion, if there is a qualified immunity portion. Please send
15 me your thoughts on that sooner rather than later. Not now, of
16 course.

17 I have some things germinating, but I don't have it
18 completely done. My charge is largely complete, but there are
19 a few questions I have, and we might start with that now. I
20 just wanted you to be aware what I don't have done is the
21 qualified immunity portion, and I don't think we want to be in
22 a situation, if we are at that stage, where we are doing it on
23 the fly. You guys may do very well on the fly. I do better
24 again with a little bit more preparation.

25 Mr. DeAtley, you are the person from the city who gave

FC7JJEN1

Trial

1 me the requests to charge. That may have been when you were
2 doing this trial solo. Are you still handling legal issues
3 relating to it, sir, or is it now Mr. Passeser I should talk to
4 about this?

5 MR. PASSESER: We will be handling together. You can
6 talk to either of us about it.

7 THE COURT: While we are here and since we do have a
8 few moments, remain standing and let me talk to you about a few
9 things, sir.

10 With respect to the issues of things like malicious
11 prosecution, denial of fair trial and false arrest, I believe
12 that there are certain things that the parties are in agreement
13 on. For example, there was, in fact, an arrest. On the
14 malicious prosecution, I think the parties -- maybe they're
15 not, but there is a agreement on favorable termination?

16 MR. PASSESER: No, there is not, your Honor.

17 THE COURT: Fascinating! Why not?

18 MR. PASSESER: Plaintiff has a burden to put in
19 evidence and so the charge --

20 THE COURT: The charges were dismissed on motion of
21 the District Attorney.

22 MR. PASSESER: Our position is that that is not enough
23 information in itself to sustain a favorable termination.

24 THE COURT: Will you indulge me for a moment while I
25 look at my elements. Sir, can I understand, please, when we

FC7JJEN1

Trial

1 talk about false arrest, because let me begin at the beginning,
2 that is the first of these. What I typically am told by the
3 parties is that there are certain charges that could have been
4 satisfied by the conduct and the evidence is going to come in
5 at trial. So I understood them to include the things for which
6 the arrest record, the arrest report mentions.

7 I guess what I am trying to figure out is, is trespass
8 in or out? Because I did not believe it was in your charge or
9 it wasn't in both places. Is that being proffered as a basis
10 for his arrest?

11 MR. PASSESER: Yes.

12 THE COURT: And obstructing governmental authority?

13 MR. PASSESER: Yes.

14 THE COURT: Criminal possession of a controlled
15 substance?

16 MR. PASSESER: Yes.

17 THE COURT: Criminal possession of marijuana?

18 MR. PASSESER: Yes.

19 THE COURT: "Resisting arrest" I wouldn't have thought
20 because that wouldn't justify the initial arrest.

21 MR. PASSESER: There would be a Townes issue.

22 THE COURT: Yes. Is that what you want to have?

23 MR. PASSESER: Unless I am mistaken, I think it is
24 resisting a lawful arrest which is illegal. If there is no
25 other offense, I don't think we are going to get it on

FC7JJEN1

Trial

1 resisting arrest.

2 THE COURT: I think what I am doing is thinking about
3 other cases I have had with the city. The resisting arrest is
4 something that is identified in the malicious prosecution
5 section of the case, but not as the actual basis for the
6 arrest. So I understood you to be using those other four
7 charges as the bases for the probable cause to arrest him that
8 evening. Is that your understanding as well?

9 MR. PASSESER: Yes. There is an additional attempted
10 aggravated assault on a police officer.

11 THE COURT: Where is that in your charge?

12 MR. PASSESER: We just came up with that.

13 THE COURT: When were you going to tell me that was a
14 basis?

15 MR. PASSESER: Right now.

16 THE COURT: A little late, no?

17 MR. PASSESER: Understood.

18 THE COURT: What do you think?

19 MR. PASSESER: Attempted assault on a police officer.

20 THE COURT: Attempted?

21 MR. PASSESER: -- assault on a police officer is
22 already in there. We were adding the attempt element.

23 THE COURT: We'll see. Okay. All right.

24 Moving then to the question of malicious
25 prosecution --

FC7JJEN1

Trial

1 MR. BOYLE: Could I be heard on that?

2 THE COURT: Yes, Mr. Boyle.

3 MR. BOYLE: In none of the arrest reports is the
4 charge of obstructing governmental administration. That is not
5 what was alleged in any of the arrest reports or even in the
6 felony complaint. I don't think at this late stage they can
7 simply add that charge.

8 THE COURT: I understood it to be in the deposition,
9 sir. I understood that to be one of the bases identified in
10 the depositions. That is where I got it from.

11 MR. BOYLE: From one of the officers?

12 THE COURT: That's correct.

13 MR. BOYLE: That was not an arrest charge in the
14 arrest report. It is an afterthought. I don't think they can
15 come up with an afterthought to justify something that happened
16 previously.

17 THE COURT: My understanding of the false arrest law
18 is that it doesn't have to be something that was identified at
19 the time and it doesn't even have to be something that was in
20 the contemplation of the officers. It has to be something that
21 amounts objectively to probable cause for an arrest.

22 MR. BOYLE: I would also note they never put in their
23 requests to charge that they submitted to the court an
24 obstructing of governmental administration charge to the jury.
25 Here we are ready to start trial and it is prejudicial to the

FC7JJEN1

Trial

1 plaintiff now to have to meet that.

2 THE COURT: I will consider what you've just said.
3 Again I saw that in the deposition testimony. Perhaps I am
4 misremembering that.

5 MR. BOYLE: There is no question it is in. I believe
6 it is now Sergeant Ruiz's or Agate's deposition testimony.

7 Ruiz was asked what could he possibly be arrested for
8 at this point, and that was proffered. In the request for a
9 jury instructions, there is no stated basis of obstructing
10 governmental administration as a grounds for the arrest.

11 THE COURT: May I ask how it prejudices the plaintiff?

12 MR. BOYLE: Just in terms of strategy and in terms of
13 what was going to be the approach to the case. There is
14 certain theories and, in fact, one of the problems in preparing
15 here was well, what was the initial basis for the stop and for
16 the arrest? When we were putting in a charge, what are they
17 going to say is the basis for it?

18 I certainly would want to -- so I think it is
19 prejudicial in that basis, and certainly we would want, if the
20 court is inclined to allow that, as a basis to put in our own
21 charge on that issue or our own requests for charge on that
22 issue.

23 THE COURT: Can you send that to me, get that to me by
24 tomorrow morning? Not today. The charge, it is just one
25 little paragraph, is it not?

FC7JJEN1

Trial

1 MR. BOYLE: It is a stated basis for the arrest. We
2 have to go back. The answer to the question is yes, we'll get
3 something to the court as soon as we can.

4 THE COURT: As you're doing that, I will want to know
5 what you said regarding the prejudice. I don't want to be in a
6 situation where I further prejudice you, as it were, by telling
7 you later than now that I am letting it in. I am thinking
8 about whether I am going to let it in. I am not thrilled these
9 two bases have been identified for me this morning.

10 I want to think about whether it is appropriate to let
11 it in. I am sorry to the extent this results in extra work for
12 you, although I hope it is not a lot. I want you to be in a
13 position to have a charge for me if I decide to let it in.

14 MR. BOYLE: That would be both on the obstructing
15 governmental administration and attempted assault?

16 THE COURT: Yes. The attempted assault I don't know
17 is that much different than what is in here already and we sort
18 of knew about, but yes.

19 MR. BOYLE: There is also an issue with respect to the
20 assault and attempted assault, which of the officers Mr.
21 Jenkins alleged to have assaulted and attempted to assault.

22 In other words, there is this -- I know the court has
23 now read everything -- there is this initially, allegedly
24 initial interface. Now this is the officers' version of the
25 events. This is an interface where Mr. Jenkins allegedly

FC7JJEN1

Trial

1 pushes Officer Ruiz. Is that the attempted assault? Or is it
2 in the course of the ensuing scuffle, as it were? I think we
3 should be able to, in terms of trying our case, know what is
4 their theory.

5 THE COURT: Fair enough.

6 Mr. Passeser, is the attempted assault on Officer Ruiz
7 and no one else?

8 MR. PASSESER: The first attempted assault would be on
9 Officer Ruiz, yes, that shove.

10 Then in the course of the struggle, I think if it is a
11 sufficiency of the evidence issue, we are going to have to wait
12 for the charge conference. There will be evidence he assaulted
13 all three police officers.

14 THE COURT: Here is my question.

15 The other assaults I understood to have taken place in
16 the course of attempting to subdue him to arrest him. To me it
17 is on the same plane as resisting arrest. In order to get the
18 probable cause to arrest him in the first instance, you're
19 limited to Officer Ruiz. Do you disagree?

20 MR. PASSESER: Yeah, I think that is right, your
21 Honor, yes.

22 THE COURT: Mr. Boyle, if I am letting it in, that is
23 how I am letting it in.

24 MR. BOYLE: Thank you, your Honor.

25 THE COURT: Let me then please proceed to the issue of

FC7JJEN1

Trial

1 malicious prosecution. On the issue of the commencement or
2 continuation of a criminal prosecution against the plaintiff, I
3 think I know how things are going to shake out. On the issue
4 of termination of proceedings, you have told me that is not
5 something -- absence of probable cause, that is something you
6 dispute.

7 Existence of malice, that is something you dispute.

8 Deprivation of liberty, do you dispute that, sir?

9 Let me be clear because it is two pieces. I
10 understand he will say it is as well the parole hold and his
11 incarceration on the parole violation. Separate and apart from
12 that, I am understanding one of the reasons Ms. Richman is
13 going to testify is tell us he was required to come back to
14 court repeatedly over a period of months. I understood that
15 actually satisfies the deprivation of liberty component.

16 Are you agreeing with the plaintiffs as to none of
17 these elements, sir?

18 MR. PASSESER: I am not sure off the top of my head.

19 If he came back, was required to come back to court on
20 criminal charges before his parole was revoked, if he was, then
21 I think that is deprivation of liberty.

22 THE COURT: Okay.

23 MR. PASSESER: From the point his parole is revoked, I
24 don't think there is additional deprivation of liberty to come
25 to court. He is already incarcerated at that point.

FC7JJEN1

Trial

1 THE COURT: On the issue -- that is the question -- on
2 denial of fair trial, I presume again you're agreeing on
3 nothing?

4 MR. PASSESER: As far as I understand it, the denial
5 of right to fair trial is we falsified evidence by planting
6 drugs on the plaintiff, which we dispute.

7 THE COURT: I also understand it is the question of
8 providing false information to Assistant District Attorney
9 regarding the assault, regarding possession of cocaine,
10 regarding possession of marijuana and regarding the resistance
11 or not of the arrest.

12 MR. PASSESER: Our position is that legally the
13 officers' testimony cannot suffice for denial of right to fair
14 trial. It has to be fabricated evidence, the drugs in this
15 case.

16 THE COURT: The recent run of Javanovic decisions,
17 doesn't that suggest that simply giving false information -- if
18 it is found to be false -- to the ADA which is then used to
19 influence in some way the progress of the prosecution, wouldn't
20 that count as well?

21 MR. PASSESER: There are cases that hold that.

22 There are also cases that agree with us, and Judge
23 Gleason in the Eastern District has a decision that says in sum
24 and substance, the criminal complaint would never come in at
25 the criminal trial because it is hearsay. The officers'

FC7JJEN1

Trial

1 testimony in the grand jury or otherwise is immune under
2 absolute immunity. Therefore, the only way you can actually
3 have denial right to fair trial claim is if you fabricated
4 physical evidence. That is our position legally. If the court
5 disagrees with us, so be it.

6 THE COURT: I am not sure I agree or disagree. I am
7 not sure it is articulated in your request to charge to me in
8 that fashion.

9 MR. PASSESER: Yes, your Honor.

10 THE COURT: We'll have to see about that.

11 Mr. Passeser, the plaintiffs have included in the
12 proximate cause element of the denial of fair trial claim a
13 statement about -- I understand why they did this. I am
14 inclined to include it -- the fact that there was a deprivation
15 of liberty; namely, the parole incarceration, they argue, was
16 proximately caused by the arrest and by the statements made by
17 the officer defendants in this case.

18 I am inclined to put it in there on a theory of the
19 case idea. When you see the charge, I will allow you -- I will
20 not have one side's position. You will get a sentence in
21 response. I want you, if you want to tell me now what that is,
22 fine. I suspect you want to think about it when you see this.

23 Correct, sir?

24 MR. PASSESER: Correct. I anticipate that will be the
25 subject of a Rule 50 motion.

FC7JJEN1

Trial

1 THE COURT: Yes, I think it will.

2 Then that is all I have in terms of notes of myself on
3 the charge. What I will try to do is take into account what we
4 have talked about today. I would like to get the charge to the
5 parties tomorrow morning because while I know -- I may not be
6 able to. I am going to try -- I know there is a school of
7 thought you just give the litigants the charge 30 minutes
8 beforehand, give them a chance to read it.

9 I care more that this charge is correct than I care
10 about you guys seeing it for 30 minutes or three days. It
11 would be my hope that you're not going to engage in
12 wordsmithing and actually tell me what is wrong with it. That
13 is the plan. That is why I am giving it to you so early so I
14 can have better commentary on it. That is all I have in terms
15 of housekeeping.

16 Is there anything the parties want to raise to my
17 attention this morning before we get the jury panel?

18 MR. BOYLE: Is the court going to address some of the
19 exhibits issue now or wait until later?

20 THE COURT: I guess my issue is that I don't know
21 whether these exhibits are all designed to be introduced at
22 trial and shown to the jury. I will give you for instance.
23 The parole records contained in the plaintiff's exhibits, there
24 are references to the plaintiff's prior conviction. I didn't
25 think he wanted that to be shown to the jury. That is what I

FC7JJEN1

Trial

1 was saying earlier.

2 MR. BOYLE: One of the things I did this weekend was
3 actually take the old fashioned correcting tape and made some
4 of those redactions both in some of the parole records and I
5 believe in the arraignment transcript where there was a
6 reference to it already. I did some of that and made
7 additional exhibits. Obviously, I did not intend that to go to
8 the jury.

9 THE COURT: That was my question. I assumed as much,
10 but I just figured I would ask.

11 Sir, I know you don't want to give away your theory of
12 the case so soon, but I wanted to understand a little bit
13 better because it hasn't happened in my other cases. What is
14 Ms. Richman going to testify to?

15 MR. BOYLE: Several things. She, first of all, she
16 was summoned to represent Mr. Jenkins at the arraignment. She
17 saw him. She will testify as to her observations of him, his
18 injuries, and she also then went in front of the court and made
19 a record in front of the court, with Mr. Jenkins present,
20 saying, "Judge, look at his head, look at his hands, look at
21 the blood," which I believe laid a foundation for admission of
22 the transcript itself of the arraignment as a present
23 sense-impression.

24 She is relating what she is observing at the time that
25 she is, in fact, observing it. So we would use her for that.

FC7JJEN1

Trial

1 She also represented him throughout the course of the criminal
2 case and represented him at Parole. To the extent that
3 favorable termination is an issue here --

4 THE COURT: Apparently it is, yes.

5 MR. BOYLE: -- and we reserve our right also at a Rule
6 50 time to not have that go to the jury, that particular
7 element of the offense. Ms. Richman will testify to the course
8 of those proceedings and what she understood to be the motion
9 of the D.A. to dismiss. That is what we expect her to testify
10 about.

11 THE COURT: I understand, and that makes complete
12 sense to me. The one question I had, sir, some of the letters
13 that are prepared to be introduced, I don't know whether they
14 are for her or for the jury. I am looking at Exhibits 27 and
15 28. They contain, to my mind -- well, she is having
16 discussions and understandable discussions with the District
17 Attorney about her view as to the case and their view as to the
18 case. I didn't know how they were coming in.

19 MR. BOYLE: Now addressing to Exhibit 28 which also
20 would incorporate Exhibit 10, in her letter of May 24th, 2010,
21 Ms. Richman informs the District Attorney that after
22 Mr. Jenkins' arraignment in court, she went back to the pens to
23 speak with him. He then handed her his wallet which contains
24 his identification and a lot of other personal papers,
25 Metrocard, family pictures, and so forth and so on.

FC7JJEN1

Trial

1 There is an issue here about the planting of the drugs
2 and how the search at the scene took place, and without going
3 too much, I think it is relevant that he had this on his person
4 after that search is relevant. In terms of it coming in, she
5 will testify as to her interactions with Mr. Jenkins, and I
6 expect that I will show her -- we only have photocopies -- the
7 contents of the wallet and we would seek to introduce the
8 contents of the wallet, not necessarily the letter.

9 If it becomes an issue in the case as to whether that
10 information was transmitted to the District Attorney, we would
11 certainly reserve our right to introduce the letter, Exhibit
12 28, that is.

13 THE COURT: I understand that. The other side is
14 aware as well.

15 Then I saw 29 is the retention letter. I understand
16 why that would be coming in. That was my question because I
17 certainly want her, she is permitted to testify about her
18 first-hand observations and the information she received in
19 terms of the materials she received and what she transmitted to
20 the District Attorney for reasons that you and I have just been
21 talking about. I just didn't want her to become a vehicle for
22 basically "me too-ing," everything that Mr. Jenkins had told
23 her.

24 MR. BOYLE: I will be careful about not seeking to
25 have her testify about anything Mr. Jenkins told her.

FC7JJEN1

Trial

1 THE COURT: Attorney-client privilege and all of that.

2 MR. BOYLE: All of that kind of poo-poo stuff.

3 THE COURT: I understand.

4 So, sir, that was the evidentiary issues I had. Are
5 there things the parties want to talk about now or first talk
6 between yourselves and figure out what it is you disagree with
7 and let me know?

8 You can also do that tomorrow morning, which is when I
9 think this stuff will perhaps have more immediacy. I can do
10 whatever at this point. Have you spoken with your adversaries
11 about the exhibits that are proposed?

12 MR. BOYLE: I think we had a valiant attempt. We
13 didn't reach much agreement. I think in the pretrial order
14 under the plaintiff's exhibits, which there are many, many
15 which would be disputed which I knew it is not an issue. It
16 becomes whether -- and I don't want to speak for counsel --
17 they had questions about relevance and maybe hearsay and so
18 forth within the documents themselves.

19 I don't think there is a dispute, for example, that
20 the documents in Exhibit 19, which is the parole file are, in
21 fact, from Parole in terms of being authentic, or the criminal
22 court complaint, the felony complaint, we agree that is the
23 felony complaint. The issue is --

24 THE COURT: Is it relevant?

25 MR. BOYLE: -- is it relevant? I don't want to speak

FC7JJEN1

Trial

1 for the other side.

2 THE COURT: I will let them talk.

3 May I ask this, sir. The hospital records, who is
4 getting them in?

5 MR. BOYLE: I believe there is no issue as to
6 authenticity of the hospital records.

7 THE COURT: As to authenticity, right. I am
8 questioning about admissibility. I didn't know who was going
9 to say these were prepared in the ordinary course of business
10 and it was the ordinary course of business to prepare these
11 records. Perhaps the parties both want them in, and that is
12 fine. I was trying to figure out who was going to be the
13 person through which these records were admitted.

14 Yes, Mr. Passeser?

15 MR. PASSESER: I think they're certified. There is a
16 certification that comes with the record.

17 THE COURT: You're fine with that?

18 MR. PASSESER: There is no dispute.

19 THE COURT: You're saving me the trouble. Thank you.
20 Mr. Passeser, let me ask you a few more questions.

21 You have just heard Mr. Boyle and I talking about some
22 of these exhibits. Do you want to talk now about your
23 objections to them, sir?

24 MR. PASSESER: No. Mr. Boyle is correct, it is not
25 really about authenticity as far as the exhibits go. It is

FC7JJEN1

Trial

1 more how they're used and introduced. A lot of them contain
2 hearsay, and I am not sure the purpose for which Mr. Boyle
3 intends to admit them right now. I don't know if it will be
4 admissible or not. I don't know how much progress we are going
5 to make talking about it right now. We have to see how it is
6 being used.

7 THE COURT: Please understand I want to keep sidebars
8 to an absolute minimum and I don't want the jury's time to be
9 wasted, for lack of a better term. It is not because obviously
10 resolution of these issues is important. I don't want them
11 waiting unnecessarily. I appreciate your efforts to try to
12 work it out. It would be nicer if you could succeed in working
13 it out. I do understand.

14 MR. BOYLE: There are some and not many which we would
15 like the opportunity to address whether it is today or tomorrow
16 morning because I think if we need to call a witness, for
17 example, on the parole documents, if we need to bring in
18 Mr. Watkins, and I have theories as to why, and I have an
19 argument why we don't need a witness to do it, but that is one
20 of the things I think we could address ahead of time rather
21 than waiting for the actual witness.

22 THE COURT: Am I correct that Mr. Watkins is going to
23 be a witness for the defense in this case?

24 MR. PASSESER: No.

25 THE COURT: I thought he was. We had this discussion

FC7JJEN1

Trial

1 about Sergeant Lubrano and Mr. Watkins. For lack of better
2 term, we split the baby, and Sergeant Lubrano was taken off the
3 witness list and Watkins is not. Is he off the list?

4 MR. PASSESER: Subsequent to that conference --

5 THE COURT: You were going to tell me this when?

6 MR. PASSESER: -- the order for a deposition for
7 officer Watkins. We offered plaintiff's counsel to never mind,
8 we don't need to call Mr. Watkins. We were informed by the
9 plaintiff's counsel they were intending to call officer
10 Watkins. I believe he will be a witness for plaintiff.

11 THE COURT: Is it your contemplation, Mr. Boyle, these
12 documents will come in through him?

13 MR. BOYLE: They could or we believe we could offer
14 them, being that there is no issue as to authenticity and that
15 they are public records pursuant to 803 (8), they could come in
16 even without a witness.

17 THE COURT: Except for this. The very first thing,
18 the parolee chrono report, that is a public record?

19 MR. BOYLE: The Division of Parole is a public agency.
20 803 (A) I believe the first subdivision says activities of the
21 agency. That is certainly a record of the activities of the
22 agency, not necessarily all of the activities in the chrono
23 report, but certainly a few of them. For example, there is
24 references to a discussion, and I guess we are having this
25 discussion now?

FC7JJEN1

Trial

1 THE COURT: Yes, sir.

2 MR. BOYLE: There are references to discussions
3 between Mr. Peart, P E A R T, and Mr. Watkins which are
4 memorialized in these documents. These are both people from
5 the Division of Parole. We are not talking about third-party
6 statements made to an agency where they say okay, as a result
7 of this arrest, we have to violate Mr. Jenkins. That is in the
8 chrono report.

9 It is also in, and I think I have a stronger argument
10 for admissibility on it, Exhibit 19, there is a Bates stamp at
11 the bottom of Defendants' 303, this was a document which was
12 submitted in opposition to the motion for the summary judgment
13 which initiated the parole warrant, violation of parole
14 proceeding and has reasons for recommended action, and it says
15 the new arrest.

16 THE COURT: I am just saying I perceive a difference,
17 and perhaps I need to do more research on this, between
18 documents of this type, of this page you are now showing me,
19 303 and both the chron, computer chronology at 273, and the
20 handwritten notes that are later on in this exhibit.

21 I am not sure "public records" extends to the
22 handwritten notes and the analysis. Perhaps it does. I don't
23 know. I don't know enough about them.

24 MR. BOYLE: We would like to submit authorities and
25 revisit this tomorrow because I have done a little bit of

FC7JJEN1

Trial

1 research on the issue.

2 THE COURT: That would be very helpful to me. Mr.
3 Passeser, you're standing?

4 MR. PASSESER: One more thing.

5 Apart from the hearsay issue, I think a lot of these
6 documents are likely to confuse the jury. They are confusing
7 to us, and especially the handwritten notes, I can't read most
8 of them.

9 THE COURT: I didn't have a problem reading them. Let
10 me understand how they're confusing.

11 Am I correct that these handwritten notes are the
12 notes of the individual who made the recommendation that Mr.
13 Jenkins' parole be revoked and restored?

14 Is this the recommendation that was not accepted by
15 the board?

16 MR. PASSESER: I am referring to Defendants' 311.

17 THE COURT: I am looking at 336. Let me turn to 311
18 then. Those notes, I agree, are somewhat confusing. I am
19 talking about 336, sir.

20 MR. PASSESER: Right. That I am not -- as far as the
21 opinion of the court goes, I still think there is a hearsay
22 issue. I was specifically referring to the handwritten notes
23 on the other page when I was talking about confusing to the
24 jury.

25 THE COURT: I am not sure that Mr. Boyle is concerned

FC7JJEN1

Trial

1 about 311. Maybe he is.

2 MR. BOYLE: I am not concerned about that.

3 THE COURT: I didn't think so.

4 MR. BOYLE: I would say just add -- and again we'll
5 submit some authorities -- the document beginning on 336 is the
6 actual decision of the administrative law judge.

7 THE COURT: Yes.

8 MR. BOYLE: Which is a classic public record. It is a
9 decision of a judicial officer lodged in the file.

10 THE COURT: He gets to write it out longhand, yes.

11 MR. BOYLE: As is the subsequent decision of what
12 happened on the appeal and the basis for the appeal. Now I
13 would be referring to 330 -- actually, 329 and 330, which is
14 certainly a public record.

15 THE COURT: 329 and 330?

16 MR. BOYLE: Yes. It is at the back of Exhibit 19.

17 THE COURT: That is what is confusing me. It is out
18 of order.

19 MR. BOYLE: I tried to put it in chronological order,
20 whereas the Bates stamps aren't.

21 MR. PASSESER: I can save the Court some time. We
22 have no objection to 329 and 330.

23 THE COURT: Is there anything you object to other than
24 311? Well, could you let me know what pages you object to, and
25 Mr. Boyle will give me the authorities he will give me.

FC7JJEN1

Trial

1 MR. PASSESER: Yes.

2 THE COURT: Thank you. Are there other documents you
3 want to talk about right now?

4 MR. BOYLE: There can be.

5 THE COURT: Only if you both discussed them.

6 MR. BOYLE: I think we did. I don't want to -- now,
7 Exhibits 1 and 2, we can start right there. It is the
8 complaint report, and the second thing is what is called the
9 arrest report, Exhibit 2.

10 THE COURT: Mr. Passeser, are they coming in or are
11 you objecting to their introduction?

12 MR. PASSESER: Our objection to this, it is all
13 cumulative. The officers will testify what happened. To the
14 extent they're used to impeach the officers if they're
15 inconsistent, by all means. To the extent it is more of the
16 same, the documents could confuse the jury, and they are police
17 documents, and I don't see any probative value on top of what
18 the officers already are going to say.

19 THE COURT: You have got stronger arguments for other
20 documents. These are coming in.

21 Mr. Boyle, on some of these others, Mr. Passeser has
22 told me he needs to hear how it comes in before he can tell you
23 whether they object or not. You and I may be talking about
24 things ultimately they don't object to.

25 MR. BOYLE: We might. I am prepared to continue, but

FC7JJEN1

Trial

1 maybe we can work it out.

2 THE COURT: Okay. Hope springs eternal, sir.

3 On that note, I am assuming we are going to trial?

4 This case is not settling mid-trial, correct? All right. I
5 see the head shaking from Mr. DeAtley. That is fine. I want
6 to know because I have my week set up for this.

7 MR. BOYLE: We were very still here.

8 THE COURT: No, no. Mr. DeAtley, it was his
9 gentleman's way of telling me, "No, this is not happening."

10 Unless there are other issues to discuss?

11 MR. DeATLEY: We mentioned this in the previous
12 conference. Defendant's Exhibit B are the drugs at issue. We
13 do have the drugs with us today. We are wondering if, in fact,
14 there is a place in your Honor's Chambers or in this courthouse
15 to keep them, or it makes sense for us to bring them to court
16 back-and-forth each day?

17 THE COURT: I have no place in Chambers where I am
18 comfortable keeping them. I do not know if the marshals would
19 do me the favor of allowing me to store them there. I can ask
20 them when I head upstairs.

21 MR. DeATLEY: We very much appreciate it.

22 THE COURT: Yes, let me do that. That is a fair
23 question. They don't give me vaults in Chambers, and I don't
24 want responsibility for that. Thank you.

25 MR. BOYLE: And perhaps it would save some time during

FC7JJEN1

Trial

1 the trial if we could have a view of them. We have never seen
2 them.

3 MR. DeATLEY: That is perfectly fine.

4 THE COURT: He will show them to you now while I am
5 talking with the marshals. Anything else? All right. Thank
6 you very much for indulging me in these housekeeping matters.
7 I will head upstairs and call the marshals.

8 (Recess)

9 (Continued on next page)

10 (Jury Voir Dire was not ordered to be transcribed and
11 can be found under separate cover)

12 (In open court; jury not present)

13 THE COURT: Thank you very much. Please be seated.
14 We are in, as it were, the home stretch of jury selection. We
15 have had our discussions and our legal conferences outside of
16 earshot.

17 THE CLERK: Your Honor, the following jurors have been
18 selected. If your name is called, please remain seated.

19 Juror No. 1, Jacqueline Rosen.

20 No. 2, Satyam Mallick.

21 No. 3, Adrienne Berziga.

22 No. 4, Marcella Briggs.

23 No. 5, Marcia Jones-Blake.

24 No. 6, Annette Aprea.

25 No. 7, Graciela Pena.

FC7JJEN1

Trial

1 No. 8, George Speropoulos.

2 Those jurors whoes names I did not call, you are
3 excused from this case with the thanks of the Court. You may
4 proceed back to 500 Pearl Street on the first floor, Room 160.

5 Thank you very much.

6 (Pause)

7 (Off-the-record discussion)

8 (Recess)

9 THE COURT: Thank you very much. Please remain
10 standing for the jury. Ms. Pena, come on here, please. We'll
11 let you join everyone else.

12 (Jury present)

13 THE CLERK: Please be seated.

14 THE COURT: You may be seated. Thank you.

15 Mr. Lopez, at your convenience, would you please swear
16 in the jury.

17 THE CLERK: Yes, your Honor.

18 (A jury of 8 was duly sworn and impaneled)

19 THE CLERK: You may be seated. Thank you.

20 THE COURT: Ladies and gentlemen, what I'd like to do
21 right now is to give you some preliminary instructions that
22 will guide you as the evidence comes in, and then we're going
23 to have the opening statements in the case, and I am going to
24 let you go for the day, and tomorrow we will begin with the
25 presentation of evidence. So I will ask you, please, to listen

FC7JJEN1

Trial

1 carefully to the instructions I'm about to give.

2 I, first of all, welcome you and wish you good
3 afternoon. This case is now officially on trial, and as I
4 stated earlier, the trial is expected to last four or five
5 days, or thereabouts, and I've explained to you already how my
6 trial day differs from other judges. The day begins earlier
7 and the breaks are shorter, but the benefit or the tradeoff is
8 that you get out in the afternoon earlier. We begin each
9 morning at 9:00 am sharp, so please, please, please be in the
10 jury room that you have now seen by 8:45 am at the latest so
11 that you can all be ready at the crack of 9:00.

12 We'll take a short break in the morning. We will
13 break for lunch around 12:30 or thereabouts, and because that
14 lunch break is only going to be a 30-minute lunch break, we
15 will arrange for there to be sandwiches or food for you to eat
16 while you're there. As a result, you won't have to really
17 leave the jury room.

18 The afternoon session will begin 30 minutes later and
19 we'll take, if necessary, a very short break in the afternoon
20 and go till about 2:30 to 2:45 pm. I just don't ever want to
21 be accused of not giving all of my thoughts on this, so let me
22 just say if we're in the middle of a witness and need to go on
23 for five more minutes to finish that witness, I might ask for
24 your indulgence. I sometimes ask jurors if they wish to go
25 into overtime for one reason or another, and they let me know.

FC7JJEN1

Trial

1 The plan is to get you out between 2:30 and 2:45 each day.

2 Now that you have been sworn in, let me give you some
3 instructions about your duties as jurors. At the end of this
4 trial I will give you more detailed instructions, especially
5 concerning the law to be applied in this case. Those
6 instructions will control your deliberations in this case, but
7 for now let me explain how the trial is going to proceed.

8 The first step in the trial will be opening
9 statements. You heard me mention that a few moments ago and
10 that is what you will hear after you hear my speaking. Then
11 counsel for the plaintiff will begin by making an opening
12 statement, which is simply an outline that is designed to help
13 you understand the evidence that we anticipate is going to be
14 introduced at this trial.

15 Then counsel for the defendants will make an opening
16 statement. Opening statements are not evidence and they're not
17 really argument. They're designed to just give you a framework
18 within which the trial is going to proceed.

19 After opening statements, the plaintiff will present
20 his evidence. That evidence will consist of witness testimony
21 as well as documents and other exhibits. The plaintiff,
22 through his counsel, will examine the witnesses and then the
23 defendants' counsel may cross-examine them.

24 Now, when the plaintiff is done presenting his case,
25 the defendants may or may not, it depends on what they wish to

FC7JJEN1

Trial

1 do, present their case, and the plaintiff will have an
2 opportunity to cross-examine any witnesses testifying for the
3 defendants.

4 After the presentation of evidence is completed, so
5 after the witnesses have testified and after the documents and
6 exhibits have been introduced in this case, counsel for the
7 parties will deliver closing arguments. These are designed to
8 summarize and interpret their views of the evidence. Just as
9 their opening statements are not evidence, attorneys' closing
10 arguments are also not evidence.

11 After closing arguments, I will instruct you on the
12 law, and then you will retire to deliberate on your verdict
13 which must be unanimous, and it must be based only on the
14 evidence that is presented in the course of trial. You do not
15 have to explain your verdict to any of us here.

16 It is important to remember that this is a civil case,
17 and so sometimes people have heard of the standard of beyond a
18 reasonable doubt. Now, if you don't know this, I will tell you
19 that is the standard for criminal cases, and that doesn't apply
20 to a civil case such as this one. In civil cases, the burden
21 is called preponderance of the evidence, and what that means is
22 that to establish a fact by a preponderance of the evidence is
23 to prove that the fact is more likely true than not true. I
24 will give you additional instructions on the burden of proof at
25 the end of the receipt of evidence in this case.

FC7JJEN1

Trial

1 Earlier when we were first together, we talked about
2 the rules that you and I play in this trial. I will go with
3 you a little more detail about that. I decide what rules of
4 law apply in the case. The way I decide this is to make legal
5 rulings during the presentation of the evidence and in giving
6 the final instructions to you after the evidence and arguments
7 are completed.

8 In order to do my job correctly, I may have to
9 interrupt the proceedings from time to time to confer with the
10 parties about the rules of law that should apply here, and
11 sometimes we'll talk here just in open court, sometimes we'll
12 talk at sidebar outside of your hearing, and some of them may
13 be a little bit longer. If I think it is going to be a longer
14 conference, what I will do I will excuse you from the courtroom
15 so you don't have to sit here and wait for us to conclude.

16 I will try to avoid these interruptions as much as
17 possible because all of us here understand your time is very
18 important and is not to be wasted. I will ask, however, you
19 are patient and understand that these conferences are necessary
20 for several reasons, in particular to ensure the fairness of
21 the trial, to ensure the evidence is coming in according to the
22 rules of evidence. I also think they have the effect of making
23 the trial proceed in a shorter, more streamlined fashion
24 because the parties understand what may and may not come in.

25 While I decide the law that applies to this case, you

FC7JJEN1

Trial

1 are the triers of fact. You weigh the evidence presented and
2 you decide whether the plaintiff has proven by a preponderance
3 of the evidence that the defendant you are considering, the
4 particular defendant you are considering, is liable to the
5 plaintiff.

6 You must pay close attention to all of the evidence
7 presented and you may base your decision only on the evidence
8 in this case and my instructions on the law. Let me take a
9 moment to speak to you about what is and is not evidence. This
10 ties together with some of the things I said earlier today.

11 Evidence consists only of the testimony of witnesses,
12 documents and other things that have been admitted into
13 evidence and stipulations or agreements that have been agreed
14 to by the parties.

15 For those of you who watch shows dealing with
16 courtroom procedure or criminal law, police procedure, you may
17 have heard the term "circumstantial evidence" and "direct
18 evidence" or you may have heard in other facets of your life.
19 You can understand that there is a difference between these
20 terms, but all of the evidence may be considered in this trial,
21 be it direct or circumstantial.

22 There are certain things that are not evidence and
23 they may not be considered by you. So let me talk to you about
24 what is not evidence. Statements and questions by counsel are
25 not evidence, nor are statements that I make or questions that

FC7JJEN1

Trial

1 I ask of a witness. It is the answer to those questions that
2 is evidence. As I said a moment ago, opening and closing
3 statements by the parties, they're not evidence.

4 Second, objections to questions are not evidence.
5 Counsel for the parties are permitted to raise an objection
6 when they believe that evidence that is being offered is being
7 offered for an improper purpose under the rules of evidence.
8 Please do not be influenced by the fact of an objection or by
9 my ruling on an objection. If I sustain the objection, then
10 you must ignore the question and any answer that may have been
11 given before I sustained the objection.

12 If the objection is overruled, then you may treat the
13 answer to that question as any other piece of evidence. In
14 some cases, although I am not sure if I will do that here, I
15 may instruct you that some item of evidence is received only
16 for a limited purpose, you may only consider it for certain
17 purposes. If I give you that instruction, you must follow it
18 and you may only consider that evidence for those limited
19 purposes.

20 Third, if there is testimony that I strike, if I tell
21 you to disregard it or if I exclude it, you may not consider it
22 because it is not evidence in this case.

23 Fourth, anything you may have seen and heard outside
24 the courtroom is not evidence and must be disregarded. As you
25 have heard me say a few times now, you are to decide the case

FC7JJEN1

Trial

1 based solely on the evidence presented here in the courtroom.

2 Now, in terms of evaluating the evidence you are about
3 to hear in the course of the coming few days, there is no
4 formula to evaluate testimony or exhibits. So instead, suffice
5 it to say that you bring with you into this courtroom all of
6 the experience and background of your lives. It is often said
7 in this courthouse you are not to leave your common sense
8 outside the courtroom because the same types of tests that you
9 use in your everyday life are the tests that you should apply
10 in deciding how much weight, if any weight, to give to the
11 evidence in this case.

12 The law does not require you to accept all of the
13 evidence admitted at trial, and in determining what evidence to
14 accept, you must make your own evaluation of the testimony from
15 each of the witnesses and your own evaluation of the exhibits
16 that are received in evidence. It is essential, however, that
17 you keep an open mind until you have heard all of the evidence
18 in the case.

19 A case can only be presented step-by-step,
20 witness-by-witness before all of the evidence is before you.
21 As I'm sure you know from your own experiences, you may hear
22 one person give a version of events that is impressive or
23 understandable or even compelling, and yet upon hearing another
24 another person's version of the same set of events or upon
25 having the original speaker cross-examined with respect to that

FC7JJEN1

Trial

1 event, things may seem very different. In other words, there
2 may be another side to any witness' story. You should use your
3 common sense and your good judgment to evaluate each witness's
4 testimony based on all of the circumstances.

5 I cannot emphasize enough that you must keep an open
6 mind until the trial is over. Please do not reach any
7 conclusions until you have all of the evidence before you. So
8 now let me caution you about certain rules and principles
9 governing your conduct as jurors in this case.

10 First, you must not talk to each other about this case
11 or about anyone who has anything to do with this case until the
12 end of the case when you begin your deliberations. The reason
13 for this requirement is that you must not reach any conclusions
14 on the claims or the defenses until all of the evidence is in.
15 Please, as I've said many times now, keep an open mind until
16 you start your deliberations at the end of the case.

17 Second, do not communicate with anyone else about this
18 case or with anyone who has anything to do with the case until
19 the trial has ended and you have been discharged as jurors.
20 When I say "anyone else," I mean anyone else. I mean members
21 of your family and your friends. For Goodness sake, please do
22 not communicate through Facebook, Twitter, blogs or things of
23 that nature. You may tell family and friends you are a juror
24 in a civil case, but please do not tell them anything about the
25 specifics of the case until you have been discharged.

FC7JJEN1

Trial

1 Third, do not let anyone talk to you about this case
2 or about anyone who has anything to do with this case. If any
3 person should attempt to communicate with you about the case at
4 any time throughout the trial, either in or out of the
5 courthouse, please report that immediately to Mr. Lopez and to
6 no one else. That means no one else.

7 To minimize the possibility of improper
8 communications, it is important that you go straight to the
9 jury room when you come in in the morning and that you remain
10 in the jury room or in this courtroom for the duration of the
11 trial day. Please use the bathrooms in the jury room rather
12 than the bathrooms on this or any other floor. Please do not
13 use the cafeteria and even if there were a public telephone,
14 and I am not sure there is, you should not use it. Our breaks
15 should be short; and, therefore, it is best you remain in the
16 jury room.

17 Fourth, do not do any research or any investigation
18 about this case or about anyone who has anything to do with the
19 case on your own. Don't go to any places you might hear
20 referred to during the trial. Don't read or listen to or watch
21 any news reports of the case, if there are any. I am not
22 saying there are. Please do not go on the internet or use
23 whatever digital or PDA devices you may have to learn things
24 about this case because all the evidence that you need will be
25 presented to you here, and that is all you may consider.

FC7JJEN1

Trial

1 Please let me know if you notice that someone else is violating
2 these rules about where the evidence may come from.

3 I have allowed each of you to be given a notebook and
4 pen because I permit jurors to take notes. You do not have to
5 take notes. I am not making you. No one is making you. Your
6 notes are an aid to your own recollections. As you see, we
7 have Court Reporters in this case who are recording everything
8 that is said in the courtroom. During your deliberations any
9 portion of that testimony can be read back to you.

10 I would remind you if you do take notes, note-taking
11 may distract you from something important that is happening on
12 the witness stand, but if you do take notes, please begin
13 writing on the page that is not the cover and please put your
14 juror number, if it is not already there, on the front page of
15 the pad so that we can be sure that you and only you will be
16 making and reviewing the notes that are in your particular pad.

17 Please do not share your notes with fellow jurors
18 during deliberations. The fact that a juror has taken notes
19 will not entitle him or her to any greater voice in the
20 deliberations. That is because a transcript will be available
21 to all jurors if there is any difficulty in remembering
22 testimony.

23 If you do take those notes, all notes you take must be
24 left each day in the jury room, and Mr. Lopez will make sure
25 that yours is there. From this point until the time when you

FC7JJEN1

Opening - Mr. Boyle

1 retire to deliberate, it is your duty not to discuss the case
2 and not to remain in the presence of other persons who may be
3 discussing this case.

4 Let me let you know now, as I should have let you know
5 before lunch, the parties in this case and their counsel have
6 been instructed to have no contact with any of you. So if you
7 happen to see any of them outside the courtroom or in the
8 elevators or things of that nature, and they don't say hello to
9 you, they don't wave, it doesn't mean they're being rude. It
10 means they're following my instruction not to have any contact
11 with you. Please don't take offense. It is all designed to
12 ensure that you have no communications.

13 This concludes my preliminary instructions to you, and
14 so we will now begin with the opening stage of the case which
15 is the opening statements. We are going to begin with counsel
16 for the plaintiff, and so I am going to ask you at this time to
17 please give your undivided attention to the attorneys as they
18 make their opening statements to you.

19 Mr. Boyle, thank you.

20 MR. BOYLE: Your Honor, okay if I move the --

21 THE COURT: Yes.

22 MR. BOYLE: May it please the Court.

23 THE COURT: Thank you, sir.

24 MR. BOYLE: Mr. Jenkins, counsel, counsel and
25 defendants. Good afternoon, ladies and gentlemen -- man,

FC7JJEN1

Opening - Mr. Boyle

1 singular. My name is Robert Boyle, and along with my
2 co-counsel, Gideon Oliver and Abraham Hassen, it is our duty
3 and privilege to represent the plaintiff in this case, Norman
4 Jenkins. Mr. Jenkins, stand for a moment. This is
5 Mr. Jenkins.

6 As you have been told many times already, this is a
7 civil case. Like most civil cases where damages are sought, it
8 is like writing a legal law. The law gives an individual the
9 right to bring a lawsuit in federal court for violations of the
10 rights guaranteed to them by the United States Constitution.

11 Mr. Jenkins brought this lawsuit because, as the
12 evidence will show, the defendants Victor Charles, Ramiro Ruiz
13 and Robert Agate, all members of the New York City Police
14 Department, violated Mr. Jenkins' constitutional rights.

15 (Continued on next page)

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1 MR. BOYLE: They falsely arrested Mr. Jenkins, used
2 excessive force during the course of that arrest, and then
3 fabricated criminal charges against him, all of which were
4 eventually dismissed.

5 You will hear how Mr. Jenkins experienced pain and
6 suffering, and continues to experience suffering, from the
7 brutal beating inflicted by the defendants, and how he was
8 wrongfully jailed for nearly a year as a direct result of the
9 false arrest and prosecution carried out by these defendants.

10 Well, what happened to Mr. Jenkins? The evidence will
11 show that the spring of 2010, when the events in this case
12 started, was a very exciting and hopeful time for him. He and
13 his then partner, Shaquala, were expecting their first son at
14 the end of May. In fact, Shaquala's due date, you will hear,
15 was May 21, 2010.

16 Now, that's something that's joyous for everyone, but
17 for Norman, for Mr. Jenkins, it was particularly exciting.
18 Mr. Jenkins has two other children, Quanisha, who is now 33
19 years old, and a daughter Diamond, who is now 14. But because
20 of the time he had spent in prison -- and I think you know from
21 the questionnaires and the questions of the Court, you know he
22 has a felony record, and that he was currently on parole and is
23 currently on parole -- he was not present for significant
24 portions of his daughters' lives. This time, Mr. Jenkins
25 resolved, was going to be different. He was going to be

FC7AJEN2ps

Opening - Mr. Boyle

1 present when Shaquala gave birth and be an attentive father to
2 his son.

3 This was an exciting time, but it was also an anxious
4 time. Shaquala was having a difficult pregnancy. She often
5 had to be taken to the doctor or the emergency room.

6 Mr. Jenkins discussed these concerns with his parole officer
7 and told him that there might be occasions when he had to take
8 Shaquala to the hospital at a moment's notice and might not be
9 at his home in Parkchester in the Bronx in time for his 9 p.m.
10 curfew. One of the restrictions Mr. Jenkins had was that he
11 had to be in his assigned residence in Parkchester by 9 o'clock
12 each night. But he explained to his parole officer that
13 sometimes he may not be able to be there.

14 It turned out that the night of May 21, 2010, over
15 into May 22, 2010, was one of those times. May 21, remember,
16 was Shaquala's due date. That evening, actually in the
17 afternoon, she began experiencing sharp pains, that everyone
18 thought was probably labor. Norman came home from work -- he
19 was working for his father as a plumber's assistant, his father
20 had a plumbing business -- and drove Shaquala to the hospital
21 in Hackensack, New Jersey, where Shaquala herself was born and
22 where she wanted her son to be born. It turned out to be a
23 false alarm. What they thought were labor pains was gas. And
24 she was able to -- she was no longer in pain, and they said,
25 come back another time, come back when the baby is about to be

FC7AJEN2ps

Opening - Mr. Boyle

1 born.

2 So they drove back to Manhattan. And in the meantime
3 Norman had received a call from Quanisha asking him to come to
4 her apartment, which is located on 102nd Street between First
5 and Second Avenues here in Manhattan.

6 So they all drove to Shaquala's apartment. That would
7 be Mr. Jenkins, Shaquala, and Mr. Jenkins' cousin, Jennifer
8 Hamilton, with whom he shared the Parkchester apartment.

9 They talked. They visited. Some of them dozed off.
10 Jennifer Hamilton, who you will hear from in this trial, was
11 the first to awaken. She woke Mr. Jenkins, and that was about
12 2 o'clock in the morning, and told him she wanted to go back to
13 the apartment that they shared in Parkchester. Mr. Jenkins,
14 though, didn't want to go. He preferred to stay in Manhattan.
15 It was 2:30 in the morning. Shaquala was there. It would take
16 him forever to get back to Parkchester at that time.

17 But he agreed to go because Ms. Hamilton, Jennifer
18 Hamilton, wanted to go back, and you'll hear her explain this
19 to you, sleep in her own bed and be home when she got up.

20 So they both left the apartment. Mr. Jenkins left a
21 few minutes before Ms. Hamilton did. And they headed from
22 102nd Street between First and Second Avenue, and heading to
23 the station of the No. 6 train at Lexington Avenue and 103rd
24 Street.

25 So Mr. Jenkins is walking toward the subway. Jennifer

FC7AJEN2ps

Opening - Mr. Boyle

1 Hamilton is walking. And she's about a half a block behind
2 him.

3 What Norman didn't know was that a nightmare was about
4 to occur. The defendants, you will hear -- that's Victor
5 Charles, Ramiro Ruiz, and Robert Agate -- were on duty that
6 night, working the midnight shift as part of the 23rd
7 Precinct's so-called anticrime unit. Dressed in plainclothes,
8 and using an unmarked police car, they were on 102nd Street
9 between Second and Third Avenues. And Mr. Jenkins entered that
10 block. Unaware of anyone's presence, Mr. Jenkins walked along
11 102nd Street headed from Second to Third Avenue. All of a
12 sudden, he will describe to you, he felt a blow to the back of
13 his head. He will describe to you how he immediately became
14 woozy and fell onto one knee, and might have blacked out for a
15 second or two. At the same time he felt someone going through
16 his pockets. But he didn't know what was happening. He
17 thought he was being robbed. At this point he did not know
18 that his attackers were police officers, dressed in
19 plainclothes. And more specifically he didn't know that they
20 would be the defendants, Victor Charles, Robert Agate, and
21 Ramiro Ruiz.

22 Now, Mr. Jenkins will explain to you how he grew up in
23 East Harlem, and in fact he attended the grammar school, which
24 was directly across the street from where he was hit in the
25 head, right there on 102nd Street between Second and Third

FC7AJEN2ps

Opening - Mr. Boyle

1 Avenue. He knew because he grew up in the neighborhood that
2 the 23rd Precinct was just about a block away.

3 So when he -- he fell to one knee. Someone went
4 through his pockets. And he's also being beaten. He tries to
5 get up and run towards Third Avenue, towards where he knew
6 there were police, in order to get help. But he was only able
7 to get up and stagger a few feet before he was caught. Because
8 he was woozy, he wouldn't make it very far. He was thrown to
9 the ground. Again he was punched and kicked. He felt blows to
10 his head, his face, his upper body, and his legs. He could now
11 feel the blood seeping from a wound in his head -- and you will
12 see pictures of the wound in his head -- onto his torso and
13 onto his clothes.

14 Now on the ground and still being beaten, he was
15 dragged by the defendants to an area just off the curb in
16 between two parked cars. And you'll see pictures later; this
17 street had angle parking in that area, not the parallel that
18 you're used to. And he's taken into the area in between these
19 two cars.

20 It was about this point that Mr. Jenkins heard from
21 somewhere, someone shout, "Hey, stop, we call the police." One
22 of his attackers said something to the effect of, "We are the
23 police, mind your own business." This was the first indication
24 to Mr. Jenkins that his attackers were police officers.

25 At this point, he will testify, one of the defendants

FC7AJEN2ps

Opening - Mr. Boyle

1 took out a can of mace. Seeing it, Mr. Jenkins pleaded for
2 them not to use it because he suffers from asthma. But in fact
3 it was used, and his face and into his nose was sprayed with
4 mace.

5 Stung by the mace, Mr. Jenkins was turned over and now
6 handcuffed on his back and laying face down on the ground. He
7 was placed in a marked patrol car, because another police car
8 came to the scene, and driven to the 23rd Precinct.

9 On the ride he was warned, by one of the defendants,
10 that he shouldn't say what happened but rather say that he was
11 attacked by some Spanish guys and then the cops came and
12 rescued him.

13 But what the defendants didn't know was that Jennifer
14 Hamilton, who was walking about a half a block behind Norman
15 Jenkins, witnessed much of what happened. You will hear her
16 describe how she saw her cousin attacked and beaten for no
17 apparent reason by people, of course that she didn't know at
18 the time were police officers, because they're dressed in
19 plainclothes.

20 At the precinct, Mr. Jenkins was booked. He was never
21 told what he was being charged with. Although bleeding from
22 his head, he was given no medical treatment other than an
23 icepack. His cellphone was returned to him, and he was able to
24 make a couple of telephone calls. The first thing he did, or
25 one of the first things he did, as he is required to, is call

FC7AJEN2ps

Opening - Mr. Boyle

1 his parole officer, to say, I've been arrested. He also called
2 a close friend of his, who was a paralegal, and requested some
3 legal representation. And eventually he got it.

4 And you will hear from that lawyer, a woman by the
5 name of Stacey Richman. Ms. Richman will testify that the
6 following day, she went to court a few blocks away from here,
7 at 100 Centre Street, in order to represent Mr. Jenkins at his
8 arraignment. She was given what was called a felony complaint,
9 a document she'll describe which lists the charges that are
10 lodged against people who are arrested. You'll see that
11 complaint. It was sworn to by defendant Victor Charles. In
12 it, Mr. Jenkins was accused of assaulting a police officer,
13 resisting arrest, possession of crack cocaine and marijuana.
14 All of those charges, Mr. Jenkins would tell you, are false.
15 And the evidence will show that defendants Charles, Ruiz, and
16 Agate knew that these charges were false.

17 Ms. Richman will describe to you about how, after
18 getting a copy of the complaint, she went into the area they
19 call the bullpens behind the courtroom where lawyers first get
20 an opportunity to talk to their clients.

21 She knew Mr. Jenkins, or was familiar with him through
22 her friendship with the paralegal who worked for her. When she
23 saw him, she will tell you, she was shocked. One eye was
24 bloodshot. He was bleeding from a gash in his head. There was
25 a stab wound on his forearm. There was blood on his clothes.

FC7AJEN2ps

Opening - Mr. Boyle

1 He was woozy and he was out of it, as she will state.

2 When the time came for the case to be called,
3 Ms. Richman made a perfect record. With Mr. Jenkins standing
4 next to her, she exhibited his injuries to the court, right
5 there on the record. She showed the court the gash in his
6 head. She showed the court the puncture wound in his arm. And
7 she told the court that the wounds he had were defensive and
8 not offensive, because she showed the court that on his hands
9 were no abrasions. But despite her efforts, Mr. Jenkins was
10 held, in lieu of \$30,000 bail, and sent eventually to Rikers
11 Island.

12 So he now faced felony charges, out of this false
13 arrest and false prosecution. But that was not all. His
14 parole officer, learning of the arrest and the charges, lodged
15 a parole violation warrant. You will learn that that meant
16 that Mr. Jenkins could be sent back upstate to state prison,
17 pursuant to his former offense, simply because he had been
18 rearrested for a new offense.

19 So now it's around May 24, 2010, when the parole
20 warrant is lodged. And so on May 28, 2010, when his son
21 Michael was born, Mr. Jenkins wasn't present. He was
22 incarcerated, on Rikers Island. Rather than being with
23 Shaquala when she gave birth, he was suffering headaches,
24 vomiting, blurry vision, and an infection, caused by the
25 beating and the, really the stabbing perpetrated by these

FC7AJEN2ps

Opening - Mr. Boyle

1 defendants. In fact you will hear how he didn't even lay eyes
2 on his son for a year.

3 For many months, there was no action on the criminal
4 case. The charges weren't even presented to a grand jury. But
5 Mr. Jenkins remained on Rikers Island due to the \$10,000 bail
6 and the parole violation warrant.

7 You will hear that there was a final parole hearing on
8 August 19, 2010. Ms. Richman, who will testify before you,
9 represented him at those proceedings too.

10 But at its beginning, something interesting happened.
11 Instead of trying to prove that Mr. Jenkins had committed new
12 crimes on May 22 -- the assault, the possession of the drugs,
13 the marijuana, the resisting arrest -- the only thing that went
14 to the hearing was whether he violated his curfew. At the
15 start of the hearing, the parole department dismissed all of
16 the charges arising out of the arrest, and only decided to
17 prove, at the parole violation hearing, that he was out after 9
18 o'clock.

19 You will hear that although Mr. Jenkins, he was found
20 guilty of violating his curfew, but the law Judge, who noted
21 that he had made a positive adjustment to parole, issued what
22 was called a revoke and restore. He found him guilty of the
23 parole violation but ordered that he be restored to parole.
24 But that didn't happen. The full parole board met, and --
25 which at the time had final say -- and imposed instead a

FC7AJEN2ps

Opening - Mr. Boyle

1 12-month hold for that curfew violation, which arose out of the
2 false arrest.

3 Eventually Mr. Jenkins was returned to state prison,
4 sent far upstate, to serve -- to re-serve and serve that time.

5 He filed an appeal, through Ms. Richman. And you'll
6 find -- you will hear that in May 2011, almost a year after the
7 incident on 102nd Street, he succeeded in that appeal. The
8 12-month hold was vacated, and he was ordered restored to
9 parole. And he was released from custody after spending almost
10 a year in prison. Remember, he still has these new criminal
11 charges pending in criminal court.

12 So he goes to court on June 1, 2011. This is over one
13 year after the attack. And all of the charges are dismissed on
14 the motion of the District Attorney's Office. So all of what
15 they said he did on May 22, all of those charges are dismissed.

16 That was, you know, maybe a somewhat convoluted
17 outline of what we will prove during the course of this trial.
18 But I wanted to give you the story so, as you hear the
19 evidence, it would hopefully come in an order and in a way that
20 makes a little bit more sense than if you just heard all these
21 dates and different proceed proceedings.

22 At the conclusion of the case, we'll be able to
23 address you again and urge you to find, in accordance with
24 Judge Failla's instructions, that each of these defendants --
25 Victor Charles, Ramiro Ruiz, and Robert Agate -- each violated

FC7AJEN2ps

Opening - Mr. DeAtley

1 Mr. Jenkins' constitutional rights. And that is his right not
2 to be subject to false arrest, his right not to be subject to
3 excessive force, his right not to be maliciously prosecuted,
4 and his right to a fair trial.

5 At that time, we will also ask you to compensate
6 Mr. Jenkins with an award of money damages, for the beating
7 inflicted on May 22, 2010, for the one-year loss of liberty to
8 which he was subjected as a direct result of the defendants'
9 actions, and the legal fees he incurred defending against those
10 criminal charges and the parole violation.

11 Thank you very much for your time and your patience,
12 and welcome to jury duty.

13 THE COURT: Thank you, sir.

14 Mr. DeAtley.

15 MR. DeATLEY: Thank you, your Honor.

16 May it please the Court?

17 THE COURT: You may. Thank you, sir.

18 MR. DeATLEY: Three officers were on patrol in East
19 Harlem. They see plaintiff. And as I will explain later, they
20 became suspicious.

21 They approached plaintiff. They tell him they're
22 police. And plaintiff responds by pushing an officer,
23 struggling with the officers, trying to run away and fight.
24 Why? For two reasons. First, because plaintiff had 41 bags of
25 crack cocaine and three bags of marijuana on his person. And

1 second, because plaintiff was a convicted felon. He was out on
2 parole. And the condition of his parole, he wasn't allowed to
3 be out at 2:30 in the morning. And of course he wasn't
4 supposed to be carrying 44 bags of drugs.

5 So when he is stopped, he has every reason to try and
6 run, to evade, to fight, and to struggle, because he's caught.
7 If he's arrested, the officers are going to find the drugs,
8 he's going to be found in violation of his parole, and he's
9 going to be sent back to prison. And that's exactly what
10 happened in this case. That's this case. A convicted felon,
11 out on parole, out when he isn't supposed to be, carrying 44
12 bags of drugs.

13 On May 22, 2010, at approximately 2:30 in the morning,
14 the three officers sitting before you -- Officer Victor
15 Charles, now Sergeant Robert Agate, and now Sergeant Ramiro
16 Ruiz -- they're on patrol in an unmarked vehicle wearing
17 plainclothes. It's a warm spring day, the weekend before
18 Memorial Day. All of them are wearing T-shirts. One of them
19 is even wearing shorts. They're on patrol in an area of East
20 Harlem known for burglaries, robberies, and drug sales.

21 Now, as the officers are driving down the street, they
22 see plaintiff. He's walking down the street, the sidewalk of
23 the New York City housing property. What draws their attention
24 to him is that he's wearing a big heavy winter coat. The
25 officers are suspicious. They watch him. And what aroused

1 their suspicions was simple. It's warm, and he's wearing a
2 huge coat.

3 The officers will tell you that they're in a division
4 called anticrime. That specific group is designed to be
5 proactive. They're looking for street-level crimes -- drug
6 sales, burglaries -- and they'll tell you that criminals of
7 such nature routinely wear heavy clothing, several layers,
8 because they can take off a jacket, throw it in the trashcan,
9 and then no longer meet the description of a suspect.

10 They'll tell you that individuals who engage in drug
11 sales routinely wear heavy clothing, lot of pockets, more
12 places to hide money, more places to hide drugs and possibly
13 weapons.

14 Now, the officers see plaintiff. And their instincts
15 are right. Plaintiff recognizes them as officers. He moodily
16 makes a sharp turn away from the officers and into the
17 property, away from the sidewalk. As he did so, he continually
18 looks back at the officers, watching them. And he speeds up in
19 a clear attempt to try and get away from them.

20 So what did the officers observe? It's a warm night
21 and they see a man with a heavy winter coat. They're already
22 on patrol in a high-crime area. And when they see plaintiff
23 recognize them, they see him turn away from the officers and
24 keep his eye on them, continually looking back.

25 So Sergeant Robert Agate and Sergeant Ramiro Ruiz get

1 out of the car. They want to approach plaintiff. They want to
2 ask him what's going on, what's wrong, what are you doing here.

3 The officers approached plaintiff. Their shields are
4 out, and they say, "Police, come here." And in response,
5 plaintiff states, "You're not taking me, I'm not coming." And
6 he pushes Sergeant Ruiz with both hands. Officer Charles is
7 parked in the vehicle, sees this, he gets out of the car and
8 runs over. He asked plaintiff, "What's wrong, what's going
9 on?" And plaintiff responds, "I'm not going back."

10 He then does exactly what you think he does. He
11 fights. The officers attempt to grab plaintiff, grab at his
12 arms, try and control him, try and restrain him. But he fights
13 back.

14 During the struggle, the officers fall to the floor,
15 fall to the ground with plaintiff. He actually gets out of
16 their grasp and runs away from the officers. Sergeant Ruiz
17 chases after plaintiff, grabs him, almost like a bear hug, and
18 takes him to the ground.

19 Throughout the struggle, the officers are yelling,
20 "Stop, police, stop resisting." But plaintiff keeps fighting,
21 keeps elbowing, keeps pushing the officers.

22 Now, you'll learn that the officers used force that
23 day. They don't deny that they used force. But they used the
24 force that was necessary to gain control and restrain
25 plaintiff. But the officers are allowed to use force. They're

1 allowed to use the reasonable amount of force necessary to gain
2 control of plaintiff. You're here because plaintiff alleges
3 that the officers used excessive force.

4 So what force did the officers use that morning? They
5 tried grabbing his arms. They tried tackling him to the
6 ground. But that didn't work. Plaintiff keeps struggling with
7 them, keeps kicking, keeps trying to run away.

8 So you will hear that an officer took out his asp, a
9 baton-like object, and he hit plaintiff in the hip area and in
10 the arms. And when I say "hit," the officer will explain that
11 he was flicking at plaintiff, in an attempt to stun him, so
12 they could gain control of him.

13 But that doesn't work. He keeps fighting. He keeps
14 struggling.

15 So finally the officer takes out his pepper spray,
16 sprays it in plaintiff's face. And that's what ends of
17 struggle.

18 Now, remember, at any point in time, this could have
19 ended. Plaintiff could have given up. He could have stopped
20 fighting. He could have stopped resisting. But he doesn't.
21 As a result, the officers had to use the force necessary to
22 stop him, to gain control of him, and to prevent him from
23 running away.

24 So plaintiff stops resisting and the officers place
25 him in handcuffs. And when they do, they find drugs in his

1 pants pocket.

2 And we have the drugs. You're going to see 41
3 individually wrapped bags of crack cocaine and three bags of
4 marijuana. Plaintiff is going to tell you that the officers
5 planted these drugs. But we know where the drugs are found.
6 They were found on plaintiff. He's going to tell you that the
7 officers didn't just plant a couple of bags of crack cocaine
8 but that they planted 41 bags of crack cocaine and three bags
9 of marijuana too.

10 Now, the story doesn't end there. Plaintiff was taken
11 back to the 23rd Precinct. He said he was pepper sprayed.
12 Because he had a bruise to his head, an ambulance was called.
13 Plaintiff was seen by that ambulance, but he refused medical
14 attention.

15 The next day, after speaking with an attorney,
16 plaintiff saw another ambulance, another EMT. And that EMT
17 transported plaintiff to a hospital.

18 At the hospital, he was treated by several nurses and
19 doctors. They listened to his complaints. They observed all
20 of what he looked like. And they gave him one dose of Tylenol.

21 So what this means is that the medical professionals
22 who saw him, a day after the incident -- they don't see the
23 injuries that plaintiff claims, they don't see the brutal
24 beating and brutal assault that plaintiff's counsel just told
25 you about. They prescribed him one dose of Tylenol, what's

1 appropriate for his actual injuries.

2 Now, plaintiff didn't mention this, but they might
3 show you an expert, an expert that plaintiff hired, that
4 plaintiff paid, who may get up on that stand and tell you all
5 about plaintiff's injuries. And I want you to be careful with
6 this expert. This expert, not only was he paid to testify at
7 this trial, he's paid for an examination of plaintiff, an
8 examination that took place four years after the incident, in
9 April of 2014. So if that expert gets up on that stand, he's
10 going to tell you how about the injuries that plaintiff
11 suffered in May of 2010, even though he didn't see him until
12 April of 2014.

13 You also heard plaintiff's counsel describe what his
14 client is going to testify to, that he was stabbed, that blood
15 was seeping from the back of his head, there was blood all over
16 his clothes, that he was beaten, that he was dragged, punched,
17 kicked, there were blows to his face and his upper body. And I
18 want you to think about what plaintiff must have looked like.
19 I want you to think about what plaintiff must have looked like
20 the day of the incident, the day after the incident. And I
21 want you to remember that. Because we have pictures. We have
22 pictures that were taken of plaintiff the day after the
23 incident. They show a bruise to his head, a cut to his arm,
24 and a puffy eye, all injuries consistent with what happened, a
25 struggle with police officers on pavement.

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1 Finally, you also heard from plaintiff's attorney
2 about the actions of these three officers, that plaintiff
3 wouldn't have spent 11 months in prison as a result of a parole
4 violation. But let me remind you that plaintiff spent those 11
5 months in prison because of his choices. He was a convicted
6 felon, out on parole, who wasn't supposed to be out at 2:30 in
7 the morning.

8 So what happens? The parole board violated him for
9 his curfew and he spent 11 months in prison as a result. It's
10 not the officers' fault that he is a convicted felon. It's not
11 the officers' fault that plaintiff was on parole. And it's
12 certainly not the officers' fault that plaintiff was out at
13 2:30 in the morning, five and a half hours past his curfew.

14 So you know who is responsible? It's plaintiff.
15 Thank you.

16 Thank you, your Honor.

17 THE COURT: All right. Now seems to be an appropriate
18 time to break for the day, because tomorrow, refreshed and
19 ready, we will begin with the presentation of evidence and the
20 presentation of defendants' case.

21 So we're going to release you for the day. As I've
22 told you, my day actually usually ends a little bit shorter,
23 but today we began at 11 a.m., so I -- let me note, first of
24 all, that I thank you for the attention that you paid during
25 the jury selection process this morning, because it made it go

FC7AJEN2ps

1 more quickly and we were able to get this piece of the trial
2 in. What I will do, to the extent I am able to, is to talk to
3 you about where we are in the life cycle of this trial. I
4 mean, it will take a day or so to start getting through the
5 witnesses. But as I have a better sense of how long things
6 will take, I will let you know. What I'm going to ask in
7 return that we see you no later than 8:45 tomorrow morning so
8 that we can begin at the crack of 9, that you not discuss this
9 case with anyone, including your fellow jurors, and that you
10 enjoy the rest of your day. And please follow Mr. Lopez to the
11 jury room. Thank you so much.

12 (Jury not present)

13 THE COURT: May I just have the litigants be seated
14 for a moment. Let me just talk about a few issues. Thank you.

15 Mr. Boyle -- I'm sorry. Do you need to talk to your
16 client?

17 MR. BOYLE: Sorry.

18 MR. JENKINS: Please, one moment?

19 THE COURT: Yes.

20 (Pause)

21 MR. JENKINS: Thank you.

22 THE COURT: Mr. Boyle -- certainly.

23 I will talk to you tomorrow about the level-one
24 performance monitoring, the issue left over from this morning.
25 At the moment, although I am continuing to think about this, I

FC7AJEN2ps

1 think we should prepare to have in the OGA and the attempted
2 assault charges in the discussion of probable cause. That's
3 what I'm going to go back and spend my evening thinking about.
4 But I had committed to you that I was going to give you
5 something tomorrow morning. That also forces me to give you
6 something tomorrow morning. So at least for now that may be in
7 there. And I will reserve the right to change it if there's a
8 reason to take it out.

9 Are we beginning tomorrow morning with Mr. Jenkins,
10 sir?

11 MR. BOYLE: Yes, your Honor.

12 THE COURT: We don't know how long it will take. But
13 can we imagine there will be another witness as well?

14 MR. BOYLE: I'm going to try to see -- I don't mind
15 sharing this with the defense -- to see if we can have
16 Ms. Richman on board for when he would finish. She is
17 intending to start trial. And she has a subpoena from me in
18 state court, which the court will honor, of course, but I told
19 her I would make every effort to accommodate her, with the
20 approval of the court. What time does your Honor usually take
21 the break, what we call the lunch hour, the lunch half hour?

22 THE COURT: The lunch half hour? About 12, 12:30, is
23 what I'm thinking. Somewhere between 12 and 12:15 and 12:30.
24 It's really going to depend on when there is a convenient
25 breaking point in Mr. Jenkins' testimony.

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1 MR. BOYLE: Subject to defense counsel being heard and
2 the Court's wishes, may I ask Ms. Richman if she could come
3 right after that break, even if Mr. Jenkins is not finished? I
4 know that can be a bit of an inconvenience. But it would allow
5 her to present -- I would like to give her a time certain.

6 THE COURT: Yes. Because she herself is on trial,
7 you're saying?

8 MR. BOYLE: She is supposed to be starting a trial.
9 And I just got a message from her, which I haven't listened to,
10 but the one I got yesterday was, you sent me the subpoena, I
11 can't find it on the computer, I need the subpoena.

12 THE COURT: Problem worth getting.

13 Mr. DeAtley and Mr. Passeser, can I understand that
14 you're not going to object too loudly if Mr. Jenkins's
15 testimony is interrupted to accommodate Ms. Richman's schedule?

16 MR. PASSESER: Yes. I think that's fine, your Honor.

17 THE COURT: That's fine, OK.

18 MR. BOYLE: Thank you.

19 THE COURT: And which of you will be handling her
20 cross?

21 MR. DeATLEY: I will be handling Ms. Richman's cross.

22 THE COURT: Thank you very much. So we will keep that
23 in mind tomorrow. You will let me know. Can we have the
24 parties in at 8:45 as well just in case there are any legal
25 issues they want to talk to me about?

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1 MR. DeATLEY: Yes, your Honor.

2 MR. BOYLE: Yes, your Honor.

3 There is one other issue I wanted to raise now.

4 THE COURT: Yes.

5 MR. BOYLE: This concerns plaintiff's Exhibit 6, which
6 is the mugshot photo. I was going raise this anyway, but I
7 think from the openings the significance of it is even more
8 apparent. This is the picture of Mr. Jenkins on the night of
9 the arrest at the precinct. There's a face shot and then, on
10 the second page of the Exhibit, 587, a full-body view. You can
11 see it's not the best -- in fact -- it's not the best
12 depiction. This was printed off the computer. We're asking
13 the defense if they have anything better to use because I think
14 it's a significant exhibit, because we want to see how he
15 looked and what he was wearing.

16 And we have discussed it, but I'll let the defendants
17 address maybe what they are able to get.

18 THE COURT: OK. Mr. DeAtley, sir.

19 MR. DeATLEY: We have informed counsel that we will
20 print out a copy of what we have and see if it's a better copy
21 than they have.

22 THE COURT: Sure. Is it something that can be sent to
23 another computer -- I'm just trying to figure out, is there a
24 way to scan it on a monitor?

25 MR. DeATLEY: We can certainly send, if it has not

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1 been sent, we can certainly send a PDF which includes the
2 Bates-stamped number. Unfortunately, your Honor, this
3 document, the specific mugshot itself, is something that's no
4 longer available. It's sealed once the charges are dismissed
5 against Mr. Jenkins. The reason why we disclosed it to
6 counsel, the reason why we have it, is that it's part of the
7 internal affairs file. It was actually printed on May 24,
8 2010. So we don't have access. And it's not even an access
9 thing. It doesn't exist anymore. It's deleted, for us to even
10 print out an additional copy.

11 THE COURT: OK. Mr. Jenkins, sir, I appreciate that
12 this is of concern to you. But unfortunately I have good
13 peripheral vision, and I can't actually --

14 MR. JENKINS: OK, I'm sorry, your Honor.

15 THE COURT: I know you didn't mean to. I just wanted
16 to give you that warning.

17 Mr. DeAtley, do you have the original of what you gave
18 to the defense?

19 MR. DeATLEY: Yes.

20 THE COURT: And have you shown that to them?

21 MR. DeATLEY: I believe it's a -- I'm looking at their
22 photo right now. The copy that we had is not as good as the
23 one that Mr. Boyle has in front of him, but I informed him that
24 I will send them the PDF that I scanned of the original, if
25 that's a better copy that they have.

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1 THE COURT: If there is an original printout
2 somewhere, there is the scan of that original, and then that
3 scan, the PDF form, is what you sent to Mr. Boyle.

4 MR. DeATLEY: Correct. And I can bring the Court
5 tomorrow the original that I have do have.

6 THE COURT: Let's please do that. Let's try and get
7 the best thing you have. And if it turns out that someone else
8 has it somewhere, in a better copy, I know you will look for
9 it.

10 MR. DeATLEY: Of course.

11 THE COURT: Thank you.

12 Mr. Boyle, is there anything else in that regard, sir?

13 MR. BOYLE: No, your Honor. Thank you.

14 THE COURT: Anything else we should be talking about
15 today, gentlemen? Because I want to let you get back to
16 preparing for this trial.

17 No. Thank you very much for today. Now we've been
18 very productive and I know it will be even more so tomorrow.
19 Thank you. I'll see you then.

20 MR. DeATLEY: Thank you, your Honor.

21 MR. BOYLE: Thank you, your Honor.

22 (Adjourned to 8:45 a.m., December 8, 2015)